

CONSUMER AND INVESTOR ACCESS TO INFORMATION ACT  
OF 1999

SEPTEMBER 30, 1999.—Ordered to be printed

Mr. BLILEY, from the Committee on Commerce,  
submitted the following

R E P O R T

[To accompany H.R. 1858]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 1858) to promote electronic commerce through improved access for consumers to electronic databases, including securities market information databases, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Consumer and Investor Access to Information Act of 1999”.

## **TITLE I—COMMERCE IN DUPLICATED DATABASES PROHIBITED**

**SEC. 101. DEFINITIONS.**

As used in this title:

(1) **DATABASE.**—(A) The term “database” means a collection of a large number of discrete items of information that have been collected and organized in a single place, or in such a way as to be accessible through a single source, through the investment of substantial monetary or other resources, for the purpose of providing access to those discrete items of information by users of the database. Such term does not include works that are combined and ordered in a logical progression or other meaningful way in order to tell a story, communicate a message, represent an idea, or achieve a result.

(B) If a database is organized into discrete sections containing a large number of discrete items of information, each section may be treated as a database if each such section meets the requirements of subparagraph (A).

(2) **DUPLICATE OF A DATABASE.**—A database is “a duplicate” of any other database if the database is substantially the same as such other database, as a result of the extraction of information from such other database.

(3) **INFORMATION.**—The term “information” means facts, data, or any other intangible material capable of being collected and organized in a systematic way, with the exception of works of authorship within the meaning of section 102 of title 17, United States Code.

(4) **COMMERCE.**—The term “commerce” means all commerce which may be lawfully regulated by the Congress.

(5) **IN COMPETITION.**—The term “in competition with” when used with respect to the sale or distribution of a database to the public means that the database—

(A) displaces substantial sales or licenses of the database of which it is a duplicate; and

(B) significantly threatens the opportunity to recover a reasonable return on the investment in the collecting or organizing of the duplicated database.

(6) **GOVERNMENT DATABASE.**—The term “government database” means a database that—

(A) has been collected or maintained by the United States of America, any foreign government, or any agency or instrumentality thereof;

(B) has been collected or maintained by a commercial entity pursuant to a contract with the United States of America or any agency or instrumentality thereof, unless the information contained in such database was permanently available on an interactive computer network without restriction in a publicly accessible electronic form without charge, at the time a duplicate of such database was sold or distributed; or

(C) is required by Federal statute or regulation to be collected or maintained, to the extent so required.

**SEC. 102. PROHIBITION AGAINST DISTRIBUTION OF DUPLICATES.**

It is unlawful for any person or entity, by any means or instrumentality of interstate or foreign commerce or communications, to sell or distribute to the public a database that—

(1) is a duplicate of another database that was collected and organized by another person or entity; and

(2) is sold or distributed in commerce in competition with that other database.

**SEC. 103. PERMITTED ACTS.**

(a) **COLLECTING OR USE OF INFORMATION OBTAINED THROUGH OTHER MEANS.**—Nothing in this title shall restrict any person or entity from selling or distributing to the public a database consisting of information obtained by means other than by extracting it from a database collected and organized by another person or entity.

(b) **NEWS REPORTING.**—Nothing in this title shall restrict any person or entity from selling or distributing to the public a duplicate of a database for the sole pur-

pose of news or sports reporting, including news and sports information gathering, dissemination, and comment, unless the information duplicated is time sensitive and has been collected by a news or sports reporting entity, and the sale or distribution is part of a consistent pattern engaged in for the purpose of direct competition.

(c) **LAW ENFORCEMENT AND INTELLIGENCE ACTIVITIES.**—Nothing in this title shall prohibit an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting under contract with such officers, agents or employees, from selling or distributing to the public a duplicate of a database as part of lawfully authorized law enforcement or intelligence activities.

(d) **SCIENTIFIC, EDUCATIONAL, OR RESEARCH USES.**—No person or entity who, for scientific, educational, or research purposes, sells or distributes to the public a duplicate of a database that has been collected or organized by another person or entity shall incur liability under this title so long as such conduct is not part of a consistent pattern engaged in for the purpose of competition with that other person or entity.

#### **SEC. 104. EXCLUSIONS.**

(a) **GOVERNMENT INFORMATION.**—

(1) **EXCLUSION OF GOVERNMENT DATABASES.**—Protection under section 102 shall not extend to a government database.

(2) **INCORPORATED NONGOVERNMENT PORTIONS PROTECTED.**—The incorporation of all or part of a government database into a non-government database does not preclude protection for the portions of the non-government database which came from a source other than the government database.

(3) **AUTHORITY TO EXCLUDE ADDITIONAL GOVERNMENT-SUPPORTED DATABASES.**—Nothing in this title shall prevent the Federal Government or a State or local government from establishing by law or contract that a database, the creation or maintenance of which is substantially funded by such Federal, State, or local government, shall not be subject to the protection afforded under this title.

(b) **DATABASES RELATED TO INTERNET COMMUNICATIONS.**—Protection under section 102 does not extend to a database incorporating information collected or organized—

(1) to perform the function of addressing, routing, forwarding, transmitting, or storing Internet communications; or

(2) to perform the function of providing or receiving connections for Internet communications.

(c) **COMPUTER PROGRAMS.**—

(1) **PROTECTION NOT EXTENDED.**—Subject to paragraph (2), protection under section 102 shall not extend to computer programs, including any computer program used in the manufacture, production, operation, or maintenance of a database, or any element of a computer program necessary to its operation.

(2) **INCORPORATED DATABASES.**—A database that is otherwise subject to protection under section 102 is not disqualified from such protection solely because it resides in a computer program, so long as the database functions as a database within the meaning of this title.

(d) **NONPROTECTABLE SUBJECT MATTER.**—Protection under section 102 does not extend to the sale or distribution to the public of a duplicate of any individual idea, fact, procedure, system, method of operation, concept, principle, or discovery.

(e) **SUBSCRIBER LIST INFORMATION.**—Protection under section 102 does not extend to a database of subscriber list information within the meaning of section 222(f) of the Communications Act of 1934 (47 U.S.C. 222(f)). Nothing in this subsection shall affect the operation of section 222(e) of such Act, under which a telecommunications carrier provides, upon request, subscriber list information for the purposes of publishing directories in any format under nondiscriminatory and reasonable rates, terms, and conditions.

(f) **LEGAL MATERIALS.**—Protection under section 102 does not extend to a database of primary legal materials, including court opinions, statutes, codes, regulations, or administrative agency decisions, from any Federal, State, or local jurisdiction, unless such materials were permanently available on an interactive computer network without restriction, in an official publicly accessible electronic form without charge, at the time a duplicate of such database was sold or distributed.

(g) **SECURITIES MARKET DATA.**—Nothing in this title shall apply to any database, or any discrete section of a database, composed predominantly of market information within the meaning of section 11A(e)(6) of the Securities Exchange Act of 1934, as amended by section 201 of this Act.

**SEC. 105. RELATIONSHIP TO OTHER LAWS.**

(a) **OTHER RIGHTS NOT AFFECTED.**—Subject to subsection (b), nothing in this title shall affect rights, limitations, or remedies concerning copyright, or any other rights or obligations relating to information, including laws with respect to patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, misuse, and the law of contract.

(b) **PREEMPTION OF STATE LAW.**—On or after the effective date of this Act, no State law that prohibits or that otherwise regulates conduct that is subject to the prohibitions specified in section 102 shall be effective to the extent that such State law is inconsistent with section 102.

(c) **LICENSING.**—Subject to the provisions on misuse in section 106(b), nothing in this title shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the use of information.

(d) **COMMUNICATIONS ACT OF 1934.**—Nothing in this title shall affect the operation of the Communications Act of 1934 (47 U.S.C. 151 et seq.) or the authority of the Federal Communications Commission.

(e) **SECURITIES LAWS.**—Nothing in this title shall affect—

(1) the operation of the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), or the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.); or

(2) the authority of the Securities and Exchange Commission.

**SEC. 106. LIMITATIONS ON LIABILITY.**

(a) **SERVICE PROVIDER LIABILITY.**—A provider of telecommunications services or information services (within the meaning of section 3 of the Communications Act of 1934 (47 U.S.C. 153)), or the operator of facilities therefor, shall not be liable for a violation of section 102 if such provider or operator did not initially place the database that is the subject of the violation on a system or network controlled by such provider or operator.

(b) **MISUSE.**—A person or entity shall not be liable for a violation of section 102 if the person or entity benefiting from the protection afforded a database under section 102 misuses the protection. In determining whether a person or entity has misused the protection afforded under this title, the following factors, among others, shall be considered:

(1) the extent to which the ability of persons or entities to engage in the permitted acts under this title has been frustrated by contractual arrangements or technological measures;

(2) the extent to which information contained in a database that is the sole source of the information contained therein is made available through licensing or sale on reasonable terms and conditions;

(3) the extent to which the license or sale of information contained in a database protected under this title has been conditioned on the acquisition or license of any other product or service, or on the performance of any action, not directly related to the license or sale;

(4) the extent to which access to information necessary for research, competition, or innovation purposes has been prevented;

(5) the extent to which the manner of asserting rights granted under this title constitutes a barrier to entry into the relevant database market; and

(6) the extent to which the judicially developed doctrines of misuse in other areas of the law may appropriately be extended to the case or controversy.

**SEC. 107. ENFORCEMENT.**

(a) **USE OF FEDERAL TRADE COMMISSION ACT AUTHORITY.**—The Federal Trade Commission shall have jurisdiction, under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), to prevent violations of section 102 of this title.

(b) **RULEMAKING AUTHORITY.**—The Federal Trade Commission may, pursuant to subparagraph (A) or (B) of section 18(a) of the Federal Trade Commission Act (15 U.S.C. 57a(a)), but without regard to the limitations contained in section 18(b)(3) of such Act, prescribe rules to implement this title.

(c) **ENFORCEMENT.**—Any violation of any rule prescribed under subsection (b) shall be treated as a violation of a rule respecting unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act (15 U.S.C. 45). Notwithstanding section 5(a)(2) of such Act (15 U.S.C. 45(a)(2)), communications common carriers shall be subject to the jurisdiction of the Federal Trade Commission for purposes of this title.

(d) **ACTIONS BY THE COMMISSION.**—The Federal Trade Commission shall prevent any person or entity from violating section 102 or a rule of the Commission under subsection (b) of this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this title. Any person or entity who violates section 102 or such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this title.

**SEC. 108. REPORT TO CONGRESS.**

Not later than 36 months after the date of enactment of this title, the Federal Trade Commission shall report to the Congress on the effect this title has had on electronic commerce and on the United States database industry and related parties, including—

- (1) the availability of databases, search engines, and other tools for locating information necessary for electronic commerce;
- (2) the extent of competition between database producers, including the concentration of market power within the database industry;
- (3) the investment in the development and maintenance of databases, including changes in the number and size of databases;
- (4) the availability of information to industries and researchers which rely upon such availability;
- (5) whether in the period after enactment of this title database producers have faced unfair competition, particularly from publishers in the European Union; and
- (6) the extent to which extraction of information from databases, to a degree insufficient to result in liability under section 102, is harming database producers' incentive to collect and organize databases.

**SEC. 109. EFFECTIVE DATE.**

This title shall take effect on the date of the enactment of this Act, and shall apply to the sale or distribution after that date of a database that was collected and organized after that date.

## **TITLE II—SECURITIES MARKET INFORMATION**

**SEC. 201. MISAPPROPRIATION OF REAL-TIME MARKET INFORMATION.**

Section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78k–1) is amended by adding at the end the following new subsection:

“(e) **MISAPPROPRIATION OF REAL-TIME MARKET INFORMATION.**—

“(1) **PROHIBITION AGAINST MISAPPROPRIATION.**—Subject to paragraphs (3), (4), and (5), any person or entity who—

“(A) obtains directly or indirectly from a market information processor real-time market information, and

“(B) directly or indirectly sells, distributes or redistributes, or otherwise disseminates such real-time market information, without the authorization of such market information processor,

shall be liable to such market information processor for the remedies set forth in paragraph (2).

“(2) **CIVIL REMEDIES.**—

“(A) **CIVIL ACTIONS.**—Any person who is injured by a violation of paragraph (1) may bring a civil action for such a violation in an appropriate United States district court, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.

“(B) **TEMPORARY AND PERMANENT INJUNCTIONS.**—To the extent otherwise authorized by section 1651 of title 28, United States Code, or other law, any court having jurisdiction of a civil action under this subsection shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of paragraph (1).

“(C) **MONETARY RELIEF.**—When a violation of paragraph (1) has been established in any civil action arising under this subsection, the plaintiff shall be entitled to recover any damages sustained by the plaintiff.

“(D) DISGORGEMENT.—When a violation of paragraph (1) has been established, if the plaintiff is not able to prove recoverable damages to the full extent of the defendant’s monetary gain directly attributable to the violation, the court, in its equitable discretion, may order the defendant to disgorge the amount of such monetary gain to the plaintiff.

“(3) PERMITTED ACTS.—

“(A) GATHERING OR USE OF REAL-TIME MARKET INFORMATION INDEPENDENTLY OBTAINED.—Nothing in this subsection shall restrict any person or entity from independently gathering real-time market information, or from selling, distributing or redistributing, or otherwise disseminating such independently gathered information.

“(B) NEWS REPORTING.—Nothing in this subsection shall restrict any news reporting entity from extracting real-time market information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the extraction is part of a consistent pattern of competing in the distribution of real-time market information with the market information processor from which the information was obtained.

“(4) RELATIONSHIP TO OTHER LAWS.—

“(A) PREEMPTION.—Subject to subparagraphs (B) through (F), on and after the date of enactment of this subsection, this section—

“(i) shall exclusively govern the unauthorized extraction, sale, distribution or redistribution, or other dissemination of real-time market information; and

“(ii) shall supersede any other Federal or State law (either statutory or common law) to the extent that—

“(I) such other Federal or State law establishes rights and remedies with respect to the unauthorized extraction, sale, distribution or redistribution, or other dissemination of real-time market information that are different from or in addition to the rights and remedies established by this subsection; or

“(II) such other Federal or State law is inconsistent with this section.

“(B) FEDERAL SECURITIES LAWS.—Nothing in this subsection shall—

“(i) affect the operation of any other provision of the securities laws (as defined in section 3(a)(47)), or the rules and regulations thereunder; or

“(ii) impair or limit the authority of the Commission.

“(C) ANTITRUST.—Nothing in this subsection shall limit in any way the constraints that are imposed by Federal and State antitrust laws on the manner in which products and services may be provided to the public, including those regarding single suppliers of products and services.

“(D) LICENSING.—Nothing in this subsection shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the extraction, sale, distribution or redistribution, or other dissemination of real-time market information, and to maintain civil actions under State law to enforce such licenses or contracts.

“(E) FEDERAL TRADE COMMISSION.—Nothing in this subsection shall affect—

“(i) the authority of the Federal Trade Commission; or

“(ii) the operation of any of the laws administered by the Federal Trade Commission.

“(F) OTHER LAWS.—Nothing in this subsection shall affect rights, limitations, or remedies concerning rights or obligations under laws with respect to patent, trademark, or fraud.

“(5) LIMITATIONS ON ACTIONS.—

“(A) ADDITIONAL LIMITATION.—No civil action shall be maintained under this subsection for the extraction, sale, distribution or redistribution, or other dissemination of market information that is not real-time market information.

“(B) PERSONS OR ENTITIES SUBJECT TO CONTRACTUAL REMEDIES.—No civil action shall be maintained under this subsection by a market information processor against any person or entity to whom such processor provides real-time market information pursuant to a contract or agreement between such processor and such person or entity with respect to any real-time market information or any rights or remedies provided pursuant to such contract or agreement.

“(6) DEFINITIONS.—As used in this subsection:

“(A) MARKET INFORMATION.—The term ‘market information’ means information—

“(i) with respect to quotations and transactions in any security; and

“(ii) the collection, processing, distribution, and publication of which is subject to this title.

“(B) REAL-TIME MARKET INFORMATION.—Taking into account the present state of technology, different types of market data, how market participants use market data, and other relevant factors, the Commission may, consistent with the protection of investors and the public interest and with the objectives of this section, prescribe by rule the extent to which market information shall be considered to be real-time market information for purposes of this subsection.

“(C) MARKET INFORMATION PROCESSOR.—The term ‘market information processor’ means any exchange, self-regulatory organization, securities information processor, or national market system plan administrator.”.

#### SEC. 202. EFFECTIVE DATE.

(a) IN GENERAL.—The amendment made by section 201 shall take effect on the date of the enactment of this Act, and shall apply to acts committed on or after that date.

(b) PRIOR ACTS NOT AFFECTED.—No person or entity shall be liable under section 11A(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78k-1(e)), as added by section 201 of this Act, for the extraction, sale, distribution or redistribution, or other dissemination of real-time market information prior to the date of enactment of this Act, by that person or by that person’s predecessor in interest.

#### PURPOSE AND SUMMARY

The purpose of H.R. 1858, the Consumer and Investor Access to Information Act of 1999, is to protect against unfair competition in the electronic database marketplace, while ensuring that information—particularly information that is accessible via the Internet—remains widely available to the American public.

H.R. 1858 comprises two titles. Title I governs all databases in general and creates new protections against the selling or distributing of duplicated databases in interstate and foreign commerce. Title II deals specifically with databases that are used for the collection and dissemination of stock quote information and provides new protections under Federal securities laws for the entities that collect and disseminate such information (such as stock exchanges). While both title I and title II afford databases new legal protections, these protections are carefully limited to ensure that the American public will continue to have access to information, which is critical to the growth and development of a robust electronic marketplace.

#### BACKGROUND AND NEED FOR LEGISLATION

##### *The importance of databases to electronic commerce*

Economists have long recognized that one of the great obstacles to the efficient operation of markets is imperfect information. A consumer might pay too much for an item because he or she was unaware of the lower price being charged for the item at another store, and the transaction cost of visiting all the stores to determine which charged the least exceeded the savings of buying at the least expensive store. This problem has become more significant as markets have become more complex. The need for information on which to base economic decisions is greater now than ever before.

One of the great virtues of electronic commerce is that it has the potential to provide its participants with much more information at

much lower cost than is available in more traditional forms of commerce. This additional information will allow for the much more efficient operation of markets for capital, labor, and goods. If a small businessman is seeking a loan, the Internet will allow him to learn the terms offered by banks all over the country. If a computer programmer is looking for a job, the Internet will allow her to learn about opportunities in distant cities. And if a homeowner needs to buy a new refrigerator, the Internet will provide him with the prices in stores throughout the region. This information will benefit both the purchaser and the seller of goods and services, by providing the customer with the basis for comparison shopping, and, therefore, better values, and by providing the seller with access to more customers. We have seen some of these benefits in the last five years, and they will only accelerate in the years to come.

One of the most explosive areas of growth that consumers have benefitted from is that of securities investing on the Internet. The number of households with people trading on the Internet has reportedly nearly tripled in the last 16 months, to 6.3 million. More than 20 million households use the Internet today for investment news, quotes, and ideas. This access to information about the stock market has empowered investors and given them greater control over their finances. Reports indicate that investors feel increasingly secure about their ability to make sound investment decisions as they use the Internet to monitor their portfolios, follow news about their holdings, and obtain other information about their investments.

Indeed, the Internet will make it so much easier for people to access information that they will be confronted with a new problem—too much information. Accordingly, people will need tools for locating and organizing the information into useful forms. Otherwise, the information will be overwhelming. Such tools already exist in the form of databases, search engines, and webcrawlers, and these tools are becoming more sophisticated to keep up with the information that is flooding the Internet.

The basic information policy of this country—a policy that has existed since the writing of the Constitution—has served many communities, including the Internet and electronic commerce, extremely well. Our long-standing policy says that facts cannot be “owned.” Instead, they are in the public domain. Accordingly, a database publisher can visit the site of every bank in a State, extract data concerning each bank’s loan programs, and construct a larger database with loan information for all the banks. Another database publisher can then extract some of that information, and combine it with other information—for example, loan programs from out-of-State banks or customer service ratings of the banks—to create a new, more useful database which promotes commerce.

This information policy facilitates electronic commerce at an even more fundamental level. The culture of science involves combining new data with existing databases to create more powerful research tools. Allowing scientists to reuse facts, rather than requiring them to “reinvent the wheel,” ensures that research moves forward. Research and development is an important foundation for all commercial activity.

### *The impact of Feist*

While this Nation's non-proprietary information policy serves consumers and industries well, some database publishers are concerned that the current scope of legal protection against unfair competition is insufficient. In particular, publishers point to the Supreme Court's ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), as detrimental to the development of a robust database market. Until 1991, a few Federal courts had ruled that databases were protected by copyright law under the so-called "sweat-of-the-brow" doctrine. The courts generally reasoned that even in cases where the collection or organization of information in a database lacked creativity or originality, a publisher was nonetheless entitled to protection under copyright law because of the time and resources the publisher expended in collecting and organizing the database.

But in *Feist*, the Supreme Court ruled that copyright protection did not extend to a database of telephone number listings because the database at issue in that case did not contain sufficient creativity or originality. The Court, in other words, refused to recognize the "sweat-of-the-brow" rationale as a basis for copyright protection. *Feist*, therefore, sparked a debate as to whether database publishers would continue to invest in the creation of new and better databases, absent more legal protection.

According to the statistics contained in one study,<sup>1</sup> however, the database industry has prospered since *Feist*. For example:

- between 1991 and 1997, the number of databases increased from 7,637 to 10,338, an increase of 35 percent;
- between 1991 and 1997, the number of files contained within databases increased from 4 billion to 11.2 billion, an increase of 180 percent; and
- between 1991 and 1996, the number of online searches increased from 44.4 million to 79.9 million, an increase of 80 percent.

The study also revealed the rapid commercialization of the database industry. In 1977, government, academic, and non-profit entities produced 78 percent of all databases, while the private sector produced only 22 percent. By 1991, the government, academic, and non-profit share dropped to 30 percent, while the private sector share increased to 70 percent. Commercialization has continued since 1991, the year *Feist* was decided; by 1997, the government, academic, and non-profit share had fallen to only 22 percent, while the private sector share rose to 78 percent.

### *The need for limited legislation*

Although the existing information policy generally functions well in the context of the Internet and electronic commerce, there is one potential problem. Digital technology, which makes the Internet and electronic commerce possible, also increases the likelihood of unfair competition in the database publishing marketplace. Current law provides much protection against unfair competition. For example, the original selection, coordination, and arrangement of facts in a database are protected by copyright law. In addition, databases may be protected by license, technological measures (e.g.,

<sup>1</sup> Dr. Martha E. Williams, *The State of Databases Today*: 1999.

encryption and watermarks), and State common law of misappropriation, trademark, and trade secret.

Despite these many legal remedies, there are complaints that systematic unauthorized commercial copying of databases, particularly comprehensive databases stored in digital form, may sometimes go unremedied because of gaps in current law. H.R. 1858 is designed to plug a hole that exists in current law.

Because databases are items of commerce in their own right, and are critical tools for facilitating electronic commerce—indeed, in all commerce—Congress must ensure that database publishers have sufficient protection against unfair competition. At the same time, the protection for databases must not go so far as to protect the individual facts contained in the database. These must be available for a variety of second generation uses. Otherwise, those engaged in second generation uses—from a value-added publisher, to a research scientist, to the consumer who compiles his own database when comparing characteristics of different cars—would have to either pay a license fee, or somehow “re-discover” the facts themselves. This would amount to “a tax on information.” Moreover, it would represent a radical departure from traditional information policy.

The issue of protecting databases is especially significant to the securities markets due to the proliferation and growing importance of online investing. Recent statistics have shown that online trading now accounts for nearly 1 out of every 7 equity trades (about 14 percent) and is growing rapidly, with an increase of over 34 percent in online activity in the last quarter over the previous quarter.

Access to real-time stock quotes is essential to online investors. Investors need accurate price information in order to make informed buy-and-sell decisions. Currently, investors can obtain this information through a variety of sources, including public websites and certain television stations, as well as through the websites of their online brokers. These entities obtain the real-time market data “feed” pursuant to a contract with a market information processor (such as an exchange), pursuant to which the broker or other entity pays the market information processor a fee. One witness testified at the Subcommittee on Finance and Hazardous Materials’ hearing on the legislation that, as online investment activity has increased, so has the frequency with which investors access real-time stock quote information through their brokers’ websites.<sup>2</sup> Because the brokers that provide this information to their customers generally must pay a fee to the market information disseminator each time a customer accesses a real-time quotation, the increased frequency of investors’ accessing this information increases costs to the brokers—and, therefore, to investors, as brokers pass these costs along to their customers.<sup>3</sup> Concerns have been raised that

<sup>2</sup>Testimony of Ms. Carrie Dwyer, General Counsel and Executive Vice President for Corporate Oversight, Charles Schwab & Co., Inc., before the Subcommittee on Finance and Hazardous Materials, June 30, 1999, Serial No. 106–35, Page 60.

<sup>3</sup>Testimony of Mr. Michael J. Hogan, Senior Vice President and General Counsel, *DLJdirect* Inc.; Mr. J. Joe Ricketts, Chairman and CEO, Ameritrade Holding Corporation; Mr. Stuart Bell, Bloomberg Financial Markets; Ms. Carrie Dwyer, General Counsel and Executive Vice President for Corporate Oversight, Charles Schwab & Co., Inc.; and Mr. S. Dean Furbush, Chief Economist and Senior Vice President, National Association of Securities Dealers, Inc., before the Subcommittee on Finance and Hazardous Materials, June 30, 1999, Serial No. 106–35, Pages 55–56.

granting market information disseminators new ownership rights over real-time market data would enable them to raise obstacles—in the form of higher fees—to the public's access to this vital information. Because of these concerns, the Committee limited the scope of the protections afforded by Title II in order to avoid creating a new property right over market data that would enable market information processors to inappropriately limit the dissemination of market data to the public. The Committee, thus, specifically intends that the legislation not grant any ownership right over market data to market information processors, in order to ensure that the public continues to have full access to real-time market data.

At the same time, the market information processors such as exchanges currently use the fees that they charge for real-time stock quotes to fund their operations. The legislation does not limit or otherwise affect their ability to continue to do so, consistent with the provisions of the Securities Exchange Act of 1934 (the Exchange Act). The Exchange Act, and the rules promulgated thereunder, require, *inter alia*, market information processors to collect and disseminate market data subject to reasonable, nondiscriminatory terms and conditions.

The Committee notes that “real-time” stock quotes are to be distinguished from those provided on a delayed basis, for which stock exchanges typically do not charge a fee. The legislation provides protection to market information processors only with respect to real-time stock quotes, and does not extend any such protection for delayed data, as the Committee believes such delayed data constitutes historical fact, which should be in the public domain.

While the Federal securities laws, specifically section 11A of the Exchange Act, provide the regulatory structure under which the dissemination of securities transaction data to the public is governed, they do not provide protection for the exchanges or other market information processors against pirates of that market data. To protect the exchanges and other market information processors against hackers or others who would undermine the integrity of the data they disseminate or threaten their ability to disseminate that data, Title II of H.R. 1858 provides a limited cause of action that enables market information processors to block, and collect damages from, a person who disseminates data that he or she has obtained from a market information processor without that processor's authorization.

#### HEARINGS

The Subcommittee on Telecommunications, Trade, and Consumer Protection held a legislative hearing on Title I of H.R. 1858 on June 15, 1999. The Subcommittee received testimony from the following witnesses: Mr. Andrew J. Pincus, General Counsel, Department of Commerce; Mr. Edward J. Black, President, Computer and Communications Industry Association; Mr. Henry Horbaczewski, Vice President and General Counsel, Reed Elsevier, on behalf of the Coalition Against Database Piracy; Mr. Tim D. Casey, Chief Technology Counsel, MCI Worldcom; Mr. Lynn O'Henderson, President, Doan Agricultural Services; Mr. Frank Politano, General Attorney and Trademark and Copyright Counsel, AT&T; Ms. Phyllis Schlafly, President, Eagle Forum; Mr. James G. Neal, Dean, Uni-

versity Libraries, Johns Hopkins University Libraries, on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association; Mr. Donald Baptiste, President and CEO, USADemocracy.com; Mr. Matthew Rightmire, Director of Business Development, Yahoo! Inc.; and Dr. Gregory M. O'Brien, Chancellor, University of New Orleans. In addition, the Honorable Robert Pitofsky, Chairman, Federal Trade Commission, submitted testimony for the record.

The Subcommittee on Finance and Hazardous Materials held a legislative hearing on Title II on June 30, 1999. The Subcommittee received testimony from the following witnesses: Ms. Annette L. Nazareth, Director, Division of Market Regulation, Securities and Exchange Commission; Ms. Carrie Dwyer, General Counsel and Executive Vice President for Corporate Oversight, Charles Schwab & Co., Inc.; Mr. J. Joe Ricketts, Chairman and CEO, Ameritrade Holding Corporation; Mr. Michael J. Hogan, Senior Vice President and General Counsel, DLJdirect Inc.; Mr. Stuart Bell, Bloomberg Financial Markets; Mr. S. Dean Furbush, Chief Economist and Senior Vice President, National Association of Securities Dealers, Inc.; and Mr. Richard P. Bernard, Executive Vice President and General Counsel, New York Stock Exchange, Inc.

#### COMMITTEE CONSIDERATION

On July 21, the Subcommittee on Finance and Hazardous Materials met in open markup session and approved H.R. 1858, the Consumer and Investor Access to Information Act of 1999, for Full Committee consideration, amended, by a voice vote.

On July 29, the Subcommittee on Telecommunications, Trade, and Consumer Protection met in open markup session and approved H.R. 1858 for Full Committee consideration, amended, by a voice vote.

On August 5, 1999, the Full Committee met in open markup session and ordered H.R. 1858, reported to the House, amended, by a voice vote, a quorum being present.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 1858 reported. An Amendment in the Nature of a Substitute offered by Mr. Bliley, No. 1, to (1) clarify that the definition of a government database will include any commercial database collected or maintained pursuant to a contract with the government, *provided* that consumers have no other unrestricted access to the information in that commercial database; (2) add a savings clause to clarify that the provisions of Title I do not apply to databases covered by Title II, i.e., databases of securities market data; (3) add language to ensure that nothing in Title I affects the operation of the Federal securities laws; (4) refine the news reporting exception in Title II to more precisely specify when this exception does not apply; (5) add a provision to Title II preserving the existing authority of the Federal Trade Commission

and the operation of the laws it administers; and (6) add a provision to Title II to preserve existing law regarding patent, trademark, and fraud laws, was agreed to by a voice vote. A motion by Mr. Bliley to order H.R. 1858 reported to the House, amended, was agreed to by a voice vote, a quorum being present.

#### COMMITTEE OVERSIGHT FINDINGS

Pursuant to Clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held two legislative hearings and made findings that are reflected in this report.

#### COMMITTEE ON GOVERNMENT REFORM OVERSIGHT FINDINGS

Pursuant to Clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform.

#### NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 1858, the Consumer and Investor Access to Information Act of 1999, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

#### COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to Section 402 of the Congressional Budget Act of 1974.

#### CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to Clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to Section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 25, 1999.*

Hon. TOM BLILEY,  
*Chairman, Committee on Commerce,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1858, the Consumer and Investor Access to Information Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Hadley (for federal costs), Shelley Finlayson (for the state and local impact), and John Harris (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON  
(For Dan L. Crippen, Director).

Enclosure.

*H.R. 1858—Consumer and Investor Access to Information Act of 1999*

Summary: CBO estimates that implementing H.R. 1858 would cost the Federal Trade Commission (FTC) \$1 million to \$2 million a year over the 2000–2004 period, subject to appropriation of the necessary amounts. H.R. 1858 would allow the FTC to collect civil fines for violators of the bill’s provisions. CBO estimates that receipts from civil fines would begin in 2002 and would be less than \$500,000 in any year. Because the bill would affect receipts, pay-as-you-go procedures would apply.

H.R. 1858 would attempt to protect substantial investments made in the collecting of information or the establishing of databases with commercial value. Databases that lack a modest amount of original creative expression are not eligible for copyright protection. For example, the Supreme Court held in *Feist Publications v. Rural Telephone Service Co.*, 449 U.S. 340 (1991), that the white pages of standard telephone directories lack sufficient creative expression to sustain a copyright. To provide some protection of investments in such databases and other collections of information, H.R. 1858 generally would prohibit extracting information from a database and then selling or distributing a database that is substantially the same as the original. H.R. 1858 would define such behavior as an unfair or deceptive act under the Federal Trade Commission Act.

The bill would require the FTC to submit a report within three years on the impact of H.R. 1858 on electronic commerce and the database industry. Finally, the bill would amend securities laws to prohibit the misappropriation of real-time information about securities markets.

H.R. 1858 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt state laws regarding the protection of collections of information. However, CBO estimates that the costs of complying with this mandate would not be significant.

The bill also would create a new private-sector mandate by prohibiting the unauthorized duplication and sale of certain private databases. CBO cannot estimate the mandate’s total cost because we do not have enough information to determine the scope and impact of the new protections.

*Estimated cost to the Federal Government*

*Spending subject to appropriation*

Because H.R. 1858 would expand the definition of an unfair or deceptive practice to include selling or distributing a duplicate of a database in competition with the original, CBO anticipates that the FTC would be able to bring cases that it otherwise would be unable to pursue. Based on information from the FTC, CBO estimates that enforcing H.R. 1858 and conducting the required study would cost between \$1 million and \$2 million a year over the 2000–2004 period, subject to appropriation of the necessary amounts. Based on information from the Securities and Exchange Commission, CBO estimates that the changes in securities law would have no significant budgetary impact.

### *Revenues*

Enacting H.R. 1858 could increase governmental receipts from civil fines, but we estimate that any such increase would be less than \$500,000 annually. CBO estimates that there would be no additional receipts in 2000 or 2001 because it would take some time for suits to be initiated and resolved.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. H.R. 1858 would increase receipts by less than \$500,000 a year beginning in 2002.

Estimated impact on state, local, and tribal governments: H.R. 1858 contains an intergovernmental mandate as defined in UMRA because it would preempt state laws regarding the protection of collections of information. However, CBO estimates that complying with this mandate would not have a significant impact on state budgets primarily because states do not generally regulate in this area of law.

Estimated impact on the private sector: H.R. 1858 would create a new private-sector mandate by prohibiting the unauthorized duplication and sale of certain private databases. Currently, databases that lack sufficient original creative expression are not protected by copyright law and may be reproduced, modified, and sold without the permission of the owner. H.R. 1858 would make any firm selling an unauthorized duplicate of such a database subject to FTC fines and penalties. In order to avoid these penalties, a firm would need to obtain the consent of the database owner through a licensing or similar agreement. The cost to the firm of complying with the mandate would be either the cost of the license or the revenue foregone by ending production of the duplicate database. The firm's ability to obtain a license from the database owner would depend in part on the potential effects on competition with the owner's products.

CBO cannot estimate the mandate's total cost because we do not have enough information to determine scope and impact of the new protections. While court decisions have identified collections that failed to meet the creative expression standard under existing copyright law, these decisions are of limited use in identifying all of the types of collections to which H.R. 1858 would extend protection. Owners may have been unaware of unauthorized duplication or, even if aware of such activity, may not have chosen to test their rights in court.

Estimate prepared by: Federal Costs: Mark Hadley. Impact on State, Local, and Tribal Governments: Shelley Finlayson. Impact on the Private Sector: John Harris.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to Section 423 of the Unfunded Mandates Reform Act.

## ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

## APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Short title*

Section 1 provides that the short title of H.R. 1858 is the “Consumer and Investor Access to Information Act of 1999.”

## TITLE I—COMMERCE IN DUPLICATED DATABASES PROHIBITED

*Section 101. Definitions*

Section 101(1)(A) defines a “database” as a collection of a large number of discrete items of information (“information” is defined in section 101(3)) that have been collected and organized in a single place, or in such a way as to be accessible through a single source. The collection and organization must have required investment of substantial monetary or other resources, and it must have been performed for the purpose of providing access to those discrete items of information by users of the database. The term database does not include works that are combined and ordered in a logical progression or other meaningful way in order to tell a story, communicate a message, represent an idea, or achieve a result.

Section 101(1)(B) clarifies that, if a database is organized into discrete sections containing a large number of discrete items of information, each section may be treated as a database if each such section meets the requirements of subparagraph (A). For example, if a directory of restaurants in the District of Columbia is organized by type of food, the section composed of Italian restaurants could constitute a database within the meaning of the statute, even though it is part of a larger database (i.e., the D.C. restaurant directory).

Paragraph (2) defines “a duplicate” of a database as a database which is substantially the same as the original database, and was made by extracting information from the original database. A database need not be identical to another database to be considered “substantially the same as” the original database. The Committee, however, intends for the term “substantial” to be narrowly con-

strued such that any non-identical portion of a duplicate database is immaterial to the overall value of such database.

Paragraph (3) defines “information” as facts, data, or other intangible material capable of being collected and organized in a systematic way. Works of authorship are excluded from the definition of information. Such works—both individually and collectively—are adequately protected by copyright. Paragraph (4) defines “commerce” to mean all commerce which may be lawfully regulated by the Congress.

The definition of “in competition with” in paragraph (5) has two components. First, under subparagraph (A), the database must displace substantial sales of the database of which it is a duplicate. And under subparagraph (B), the database must significantly threaten the opportunity to recover a reasonable return on the investment in the collecting or organizing of the duplicated database. Thus, a duplicate of a database uploaded onto the Internet without authorization could be in competition with the original database (even if the Internet duplicate is available without charge) if it displaces substantial sales and threatens the opportunity to recover a reasonable return on the investment in the first database.

Paragraph (6) defines three types of “government databases”. First, under subparagraph (A), the term includes databases collected and maintained by the United States, a foreign government, or any agency or instrumentality thereof. Second, under subparagraph (B), the term covers any database that has been collected or maintained by a commercial entity pursuant to a contract with the United States, or any agency or instrumentality thereof, unless the information contained in such database was permanently available on an interactive computer network without restriction in a publicly accessible electronic form without charge, at the time a duplicate of such database was sold or distributed. Finally, subparagraph (C) makes clear that the term “government database” also includes a database that is required by Federal statute or regulation to be collected or maintained, to the extent so required.

#### *Section 102. Prohibition against distribution of duplicates*

Section 102 sets forth the core prohibition against the sale or distribution to the public of duplicated databases. Under this section, it is unlawful for any person, by any instrumentality or means of interstate or foreign commerce or communications, to sell or distribute a database that is a duplicate of a database collected and organized by another person, and that is sold or distributed in commerce in competition with that other database. Section 102 is intended to achieve a necessary balance between (1) promoting fair competition in the database publishing market, and (2) ensuring that consumers have unfettered access to facts and information.

#### *Section 103. Permitted acts*

Section 103 sets forth a variety of permitted acts. Subsection (a) clarifies that nothing in title I restricts a person from selling or distributing to the public a database consisting of information obtained by means other than by extracting it from a database collected and organized by another person.

Subsection (b) limits the application of this title to news reporting. Specifically, it provides that nothing in title I shall restrict any person from selling or distributing to the public a duplicate of a database for the sole purpose of news or sports reporting, including news and sports gathering, dissemination, and comment, unless the information duplicated is time sensitive and has been collected by a news or sports reporting entity, and the sale or distribution is part of a consistent pattern engaged in for the purpose of direct competition.

Subsection (c) specifies that nothing in title I shall prohibit an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting under contract of such officers, agents, or employees, from selling or distributing to the public a duplicate of a database as part of lawfully authorized law enforcement or intelligence activities.

Subsection (d) provides that no person or entity who, for scientific, educational, or research purposes, sells or distributes to the public a duplicate of a database, shall incur liability under this title so long as the conduct is not part of a consistent pattern engaged in for the purpose of competition with that other person.

#### *Section 104. Exclusions*

Section 104 provides for exclusions from section 102's prohibition. Section 104(a)(1) provides that protection for databases under section 102 does not extend to government databases, as such databases are defined in paragraph (6) of section 101. Section 104(a)(2) clarifies that the incorporation of all or part of a government database into a non-government database does not preclude protection for the portions of the non-government database which came from a source other than the government database. And paragraph (3) provides that title I does not prevent the Federal, or a State or local government from establishing by law or contract that a database funded by such Federal, State, or local government shall not be subject to the protections of title I.

Subsection (b) excludes databases related to Internet communications. In particular, under this subsection, protection does not extend to a database incorporating information collected or organized to perform (1) the function of addressing, routing, forwarding, transmitting, or storing Internet communications, or (2) the function of providing or receiving connections for Internet communications. The purpose of these exclusions is to ensure that this title does not interfere with the operation of the Internet.

Most databases stored in digital form require computer programs for their use. Subsection (c)(1) therefore provides that protection for databases under section 102 will not extend to computer programs (as defined by 17 U.S.C. § 101), including computer programs used in the manufacture, production, operation, or maintenance of a database. Further, any element of a computer program necessary for its operation is not protected.

At the same time, paragraph (2) explains that a database that is otherwise subject to protection under section 102 does not lose that protection solely because it resides in a computer program. However, the incorporated database receives protection only so long as it functions as a database within the meaning of title I (i.e., a

collection of a large number of discrete items of information collected for the purpose of providing access to those discrete items by users), and not as an element necessary to the operation of the computer program.

Subsection (d) provides that protection for databases under section 102 does not prohibit the sale or distribution to the public of any individual idea, fact, procedure, system, method of operation, concept, principle, or discovery. Subsection (e) provides that protection for databases under section 102 does not extend to a database of subscriber list information, as defined in section 222(f) of the Communications Act of 1934.

Subsection (f) excludes primary legal materials (such as court opinions, statutes, codes, regulations, or administrative agency decisions) from protection, unless such materials were permanently available on an interactive computer network without restriction, in an official, publicly accessible electronic form without charge, at the time a duplicate of such database was sold or distributed.

Finally, subsection (g) provides that nothing in title I shall apply to any database, or any discrete section of a database, composed predominately of market information within the meaning of section 11A(e)(6) of the Securities Exchange Act of 1934, as amended by title II of the bill. This subsection, thus, precludes the application of any of the provisions of title I to such databases for purposes of the rights and remedies provided by title I, including the provision defining the term “government database.”

#### *Section 105. Relationship to other laws*

Section 105 describes the relationship of title I to other laws. Subsection (a) makes clear that, subject to the preemption under subsection (b), nothing in title I affects a person’s rights under the laws of copyright, patent, trademark, design rights, antitrust, trade secrets, privacy, access to public documents, misuse, and contracts. Subsection (b) preempts State laws inconsistent with the prohibition in section 102.

Subsection (c) provides that, subject to the provisions on misuse in subsection (b), nothing in title I shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the use of information. Subsection (d) makes clear that title I does not affect the operation of the Communications Act of 1934, or the authority of the Federal Communications Commission. Finally, subsection (e) preserves the authority of a number of securities laws (such as the Securities Act of 1933, the Securities Exchange Act of 1934, and various other securities-related laws), as well as the authority of the Securities and Exchange Commission.

#### *Section 106. Limitations on liability*

Section 106 sets forth limitations on liability for violations of section 102. Subsection (a) provides that a provider of telecommunications or information services (within the meaning of section 3 of the Communications Act of 1934 (47 U.S.C. § 153)), or the operator of facilities therefor, shall not be liable for a violation of section 102 if such provider or operator did not initially place the database that is the subject of the violation on a system or network controlled by the provider or operator. This subsection is intended to ensure that

the broad spectrum of providers of Internet and online services are not held liable for the activities of their subscribers and other third parties.

Subsection (b) limits the liability of a person for a violation of section 102 if the person benefitting from the protection afforded by section 102 misused that protection. This subsection sets forth six nonexclusive factors that should be considered in determining whether a person has misused the protection provided by section 102.

#### *Section 107. Enforcement*

Section 107 authorizes the Federal Trade Commission to take appropriate actions under the Federal Trade Commission Act (15 U.S.C. § 41) to prevent violations of section 102.

#### *Section 108. Report to Congress*

Section 108 directs the Federal Trade Commission to report to Congress within 36 months of enactment on the effect of title I on electronic commerce and the domestic database industry.

#### *Section 109. Effective date*

Section 109 provides that title I of H.R. 1858 will take effect on the date of enactment, and will apply only to the sale or distribution after that date of a database that was collected and organized after that date. The Committee notes, however, that the material addition of facts and information to a database collected or organized prior to the date of enactment constitutes the creation of a new database under title I.

### TITLE II—SECURITIES MARKET INFORMATION

#### *Section 201. Misappropriation of real-time market information*

Section 201 amends section 11A of the Securities Exchange Act of 1934 by adding a new subsection (e). Section 11A(e) prohibits the misappropriation of real-time market information from a market information processor, establishes liability on the part of any person who violates the prohibition, and provides a market information processor with a variety of remedies against the violator. This provision expressly permits certain acts that are not included in the prohibition, namely independent gathering of market information and news reporting of market information. The provision also provides that the title shall exclusively govern the extraction, sale, distribution or redistribution, and other dissemination of real-time market information, preempting other State and Federal law that establishes different rights or remedies with respect to such dissemination or that is otherwise inconsistent with the title, with certain specified exceptions (including, for example, State contract law and Federal and State antitrust law). Subsection (e) also limits the cause of action provided by the bill to apply only to parties with whom the market information processor does not have a contract regarding the real-time market information or other right the market information processor is seeking to protect.

Paragraph (1) imposes liability on any person who obtains, directly or indirectly, real-time market information from a market in-

formation processor, and directly or indirectly extracts, sells, distributes or redistributes, or otherwise disseminates such real-time market data without the authorization of the market information processor. The prohibition in paragraph (1) does not apply to a person who merely obtained, directly or indirectly, real-time market information from a market information processor, but did not disseminate the information in any way. The Committee intends that prohibition would, however, apply to a person who disseminates that information for free (such as via the Internet), as well as to a person who disseminates that information internally (such as through an internal network of linked computers in a brokerage firm.)

Paragraph (2) sets forth the remedies that a market information processor is authorized to assert against any person who misappropriates real-time market information in violation of paragraph (1). In particular, under Paragraph (2)(A), an injured person would be authorized to bring a civil action in an appropriate United States district court, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity. Subparagraph (B) specifies that, to the extent otherwise authorized by section 1651 of title 28 of the U.S. Code or other law, any court having jurisdiction over a civil action under section 11A(e) may grant temporary and permanent injunctions, according to principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of paragraph (1). Subparagraph (B) is not intended to change current law under title 28, but to make the existing provisions of title 28 applicable to violations of paragraph (1) of the legislation. Under subparagraph (C), a plaintiff is permitted to recover money damages sustained by the plaintiff when a violation of paragraph (1) was established in a civil action. Subparagraph (D) authorizes a court, in its equitable discretion, to order disgorgement of the amount of a defendant's monetary gain directly attributable to a violation of paragraph (1) if the plaintiff is not able to prove recoverable damages to the full extent of the defendant's monetary gain directly attributable to the violation.

Paragraph (3) excludes two types of legitimate activity from the scope of the bill—the independent gathering of real-time market information and news reporting. Under subparagraph (A), no person is restricted from independently gathering real-time market information, or from redistributing or disseminating such independently gathered information. A person is considered to obtain real-time market information “independently” only to the extent that such information was not obtained, directly or indirectly, from a market information processor. This provision is designed to preserve the incentive for the development of new, efficient information sources of market information for the investing public.

In addition, under subparagraph (B), no news reporting entity is restricted from extracting real-time market information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the extraction was part of a consistent pattern of competing in the distribution of real-time market information with a market information processor from which the information was obtained. Thus, news organizations that limit their use

of real-time market information to legitimate reporting of the news would not be subject to liability.

The news reporting exception of subparagraph (B) differs slightly from that found in section 103(b). This difference is a function of the different subject matter of the two titles—including, for example, the fact that title II only provides protection for “real-time” market information, and not delayed information, whereas title I does not make such a distinction. The difference in language between the two titles is not intended to suggest that a different level of First Amendment protection should be afforded news organizations reporting real-time market information than that afforded news organizations reporting all other information.

Paragraph (4) establishes the relationship of section 11A(e) with a variety of other Federal and State laws that also may address the dissemination of real-time market information. Subparagraph (A) provides that section 11A(e) exclusively governs the unauthorized extraction, sale, distribution or redistribution, or other dissemination of real-time market information and supersedes any other Federal or State law, whether statutory or common law, to the extent that such other Federal or State law establishes rights and remedies that are different from or in addition to the rights and remedies established by section 11A(e), or to the extent that such other law is inconsistent with section 11A(e). The purpose of this preemption is to ensure that no State law can be used to assert an ownership or property right over real-time market data in contravention of the principles established by title II of the bill, which undermines the fundamental purpose of that title to ensure the continued ready access to such data by the investing public.

Subparagraph (A) does not preempt State law that is not inconsistent with section 11A(e). In addition, under subparagraph (B), section 11A(e) does not limit or otherwise affect the operation of any other provision of the Federal securities laws or the rules or regulations thereunder, and does not impair or limit the authority of the Securities and Exchange Commission (the Commission). Thus, the Commission’s existing authority over distributors of market information, including its authority over fees charged for market information, continues unchanged. As the securities markets evolve through enhanced technology and communications, the Committee expects the Commission to use this authority to maximize the transparency of the marketplace by ensuring and improving public access to stock market data.

Subparagraph (C) provides that the constraints that are imposed by Federal and State antitrust laws on the manner in which products and services may be provided to the public, including those regarding the single suppliers of products and services, are not limited in any way by section 11A(e). In addition, under subparagraph (D), the rights of parties to enter freely into licenses or any other contracts with respect to the extraction, sale, distribution or redistribution, or other dissemination of real-time market information are not restricted. In addition, section 11A(e) does not restrict the rights of parties to maintain civil actions under State law to enforce such licenses or contracts. Thus, the bill preserves all rights under State contract law. Subparagraph (E) provides that nothing in section 11A(e) affects the authority of the Federal Trade Com-

mission or the operation of any of the laws administered by the Federal Trade Commission. Subparagraph (F) provides that nothing in section 11A(e) affects rights, limitations, or remedies concerning rights or obligations under laws with respect to patent, trademark, or fraud.

Paragraph (5) limits the actions that may be maintained pursuant to section 11A(e). Pursuant to subparagraph (A), a civil action for the dissemination of market information is precluded if such information was not real-time market information. Thus, the bill does not limit in any way, or provide any cause of action regarding, the use and dissemination of delayed market data. In addition, subparagraph (C) precludes a civil action by a market information processor against any person to whom such processor provides real-time market information pursuant to a contract between the two parties, but only with respect to any real-time information or any right that is provided pursuant to the contract. Thus, the legislation provides that market information processors continue to have available their contractual remedies regarding persons with whom they have a contract, but they are not afforded new remedies under section 11A(e) against those persons with respect to rights covered by that contract.

Paragraph (6) defines several terms used in section 11A(e) that are not defined elsewhere in the Exchange Act. The term “market information” is defined in subparagraph (A) to mean information with respect to quotations and transactions in any security, the collecting, processing, distribution, and publication of which is subject to the Exchange Act. Under subparagraph (B), the Securities and Exchange Commission may, consistent with the protection of investors and the public interest and with the objectives of section 11A, prescribe by rule the extent to which market information shall be considered to be real-time market information for purposes of subsection (e). In promulgating any such rule, the Commission must take into account the present state of technology, different types of market data, how market participants use market data, and other relevant factors. This requirement is designed to ensure that any rule that the Commission promulgates regarding real-time market data does not hinder access by investors to such data, and maximizes the access by investors to all market data, including real-time and delayed market data. The Committee expects that, in developing any rule defining real-time market information, the Commission will consult with market participants, including exchanges, vendors of real-time market data, and end-users of the data. The Committee notes that this subsection authorizes, but does not require the Commission to promulgate a rule defining the term “real-time market information.” Absent any such Commission rule-making, the determination of whether market information is real-time or not would be left to the courts with jurisdiction over civil actions under section 11A(e) to interpret the plain language of the term “real-time.”

Finally, the term “market information processor” with respect to any market information is defined in subparagraph (C) to mean any exchange, self-regulatory organization, securities information processor, or national market system plan administrator that is responsible under the Exchange Act or the rules or regulations there-

under for the collection, processing, distribution, and publication of, or preparing for distribution or publication, such market information. The terms “exchange,” “self-regulatory organization,” and “securities information processor” are each defined in section 3 of the Exchange Act. The term “national market system plan” is defined in rule 11Aa3–2 under the Exchange Act, (17 C.F.R. 240.11Aa3–2). The administrators of the various national market system plans that have been approved by the Commission under rule 11Aa3–2, such as the Consolidated Tape Association (CTA) and the Options Price Reporting Authority (OPRA), are designated in the plans themselves.

*Section 202. Effective date*

Section 202 provides that new section 11A(e) shall take effect on the date of the enactment of this bill, and will apply to acts committed on or after that date. Furthermore, no person will be liable under section 11A(e) for the extraction, sale, distribution or redistribution, or other dissemination of real-time market information prior to the date of enactment of the bill, by that person or by that person’s predecessor in interest.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, existing law in which no change is proposed is shown in roman):

**SECTION 11A OF THE SECURITIES EXCHANGE ACT OF  
1934**

NATIONAL MARKET SYSTEM FOR SECURITIES; SECURITIES  
INFORMATION PROCESSORS

SEC. 11A. (a) \* \* \*

\* \* \* \* \*

(e) *MISAPPROPRIATION OF REAL-TIME MARKET INFORMATION.*—

(1) *PROHIBITION AGAINST MISAPPROPRIATION.*—*Subject to paragraphs (3), (4), and (5), any person or entity who—*

*(A) obtains directly or indirectly from a market information processor real-time market information, and*

*(B) directly or indirectly sells, distributes or redistributes, or otherwise disseminates such real-time market information, without the authorization of such market information processor,*

*shall be liable to such market information processor for the remedies set forth in paragraph (2).*

(2) *CIVIL REMEDIES.*—

(A) *CIVIL ACTIONS.*—*Any person who is injured by a violation of paragraph (1) may bring a civil action for such a violation in an appropriate United States district court, except that any action against a State governmental entity may be brought in any court that has jurisdiction over claims against such entity.*

(B) *TEMPORARY AND PERMANENT INJUNCTIONS.*—To the extent otherwise authorized by section 1651 of title 28, United States Code, or other law, any court having jurisdiction of a civil action under this subsection shall have the power to grant temporary and permanent injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent a violation of paragraph (1).

(C) *MONETARY RELIEF.*—When a violation of paragraph (1) has been established in any civil action arising under this subsection, the plaintiff shall be entitled to recover any damages sustained by the plaintiff.

(D) *DISGORGEMENT.*—When a violation of paragraph (1) has been established, if the plaintiff is not able to prove recoverable damages to the full extent of the defendant's monetary gain directly attributable to the violation, the court, in its equitable discretion, may order the defendant to disgorge the amount of such monetary gain to the plaintiff.

(3) *PERMITTED ACTS.*—

(A) *GATHERING OR USE OF REAL-TIME MARKET INFORMATION INDEPENDENTLY OBTAINED.*—Nothing in this subsection shall restrict any person or entity from independently gathering real-time market information, or from selling, distributing or redistributing, or otherwise disseminating such independently gathered information.

(B) *NEWS REPORTING.*—Nothing in this subsection shall restrict any news reporting entity from extracting real-time market information for the sole purpose of news reporting, including news gathering, dissemination, and comment, unless the extraction is part of a consistent pattern of competing in the distribution of real-time market information with the market information processor from which the information was obtained.

(4) *RELATIONSHIP TO OTHER LAWS.*—

(A) *PREEMPTION.*—Subject to subparagraphs (B) through (F), on and after the date of enactment of this subsection, this section—

(i) shall exclusively govern the unauthorized extraction, sale, distribution or redistribution, or other dissemination of real-time market information; and

(ii) shall supersede any other Federal or State law (either statutory or common law) to the extent that—

(I) such other Federal or State law establishes rights and remedies with respect to the unauthorized extraction, sale, distribution or redistribution, or other dissemination of real-time market information that are different from or in addition to the rights and remedies established by this subsection; or

(II) such other Federal or State law is inconsistent with this section.

(B) *FEDERAL SECURITIES LAWS.*—Nothing in this subsection shall—

(i) affect the operation of any other provision of the securities laws (as defined in section 3(a)(47)), or the rules and regulations thereunder; or

(ii) impair or limit the authority of the Commission.

(C) *ANTITRUST*.—Nothing in this subsection shall limit in any way the constraints that are imposed by Federal and State antitrust laws on the manner in which products and services may be provided to the public, including those regarding single suppliers of products and services.

(D) *LICENSING*.—Nothing in this subsection shall restrict the rights of parties freely to enter into licenses or any other contracts with respect to the extraction, sale, distribution or redistribution, or other dissemination of real-time market information, and to maintain civil actions under State law to enforce such licenses or contracts.

(E) *FEDERAL TRADE COMMISSION*.—Nothing in this subsection shall affect—

(i) the authority of the Federal Trade Commission; or

(ii) the operation of any of the laws administered by the Federal Trade Commission.

(F) *OTHER LAWS*.—Nothing in this subsection shall affect rights, limitations, or remedies concerning rights or obligations under laws with respect to patent, trademark, or fraud.

(5) *LIMITATIONS ON ACTIONS*.—

(A) *ADDITIONAL LIMITATION*.—No civil action shall be maintained under this subsection for the extraction, sale, distribution or redistribution, or other dissemination of market information that is not real-time market information.

(B) *PERSONS OR ENTITIES SUBJECT TO CONTRACTUAL REMEDIES*.—No civil action shall be maintained under this subsection by a market information processor against any person or entity to whom such processor provides real-time market information pursuant to a contract or agreement between such processor and such person or entity with respect to any real-time market information or any rights or remedies provided pursuant to such contract or agreement.

(6) *DEFINITIONS*.—As used in this subsection:

(A) *MARKET INFORMATION*.—The term “market information” means information—

(i) with respect to quotations and transactions in any security; and

(ii) the collection, processing, distribution, and publication of which is subject to this title.

(B) *REAL-TIME MARKET INFORMATION*.—Taking into account the present state of technology, different types of market data, how market participants use market data, and other relevant factors, the Commission may, consistent with the protection of investors and the public interest and with the objectives of this section, prescribe by rule the extent to which market information shall be considered to be real-time market information for purposes of this subsection.

(C) *MARKET INFORMATION PROCESSOR.*—The term “market information processor” means any exchange, self-regulatory organization, securities information processor, or national market system plan administrator.

